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HAROLD B. WILLEY, Cle

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

KEYSTONE MUTUAL POLICYHOLDERS' COMMITTEE,
Appellants

vs.

COMMONWEALTH OF PENNSYLVANIA;
WILLIAM GOLDSTEIN, ET AL;
KURT HITKE AND COMPANY, ET AL;
CLAUDE B. HANLEY, ANCILLARY RECEIVER
OF THE STATE OF MARYLAND
Appellees

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Appellees

BRIEF OPPOSING MOTION TO DISMISS APPEAL

The purpose of this brief, filed in compliance with the permission granted by Rule 7(3) of the Supreme Court of the United States is to oppose the motion filed by the Goldstein Committee, one of the appellees in the above matter, to dismiss the appeal on jurisdictional grounds. Accordingly, for the convenience of the Court, the component parts of the brief will be numbered to correspond with those parts of the motion which they undertake to answer.

I. Summary of Relevant Facts

The facts have been set out in some detail in appellants' Statement of Jurisdiction. However, the "Summary of Relevant Facts" in the Motion to Dismiss contains a number of conclu-

sions which are either unsupported or qualified by the facts appearing in the record, and which should be mentioned.

The decree of June 26, 1947, established that the company was insolvent and that its further transaction of business would be hazardous to its policyholders, its creditors and to the public as appellees assert, only if the decree was valid. The decree was not valid if appellants were deprived of rights guaranteed to them by the Federal Constitution. That is the very issue now before the Court. Thus the appellees introduce their motion by assuming the ultimate conclusion now in dispute.

The nature of the "audit" and of the "admissions" by the officers who had falsified the annual statement of the company, and accordingly stood to gain by co-operating with the Commissioner, one of whom had already asked the Commissioner not to prosecute his wife who was the treasurer of the company (R. 817a, 818a) have been set out in some detail in appellants' Statement of Jurisdiction.

The inability of the company to raise funds necessary to put it in a solvent condition was due both to the failure of the Commissioner to give it notice of the amount required (R. 896a) and to the failure to give it the statutory time to make good the impairment to its reserves. (R. 231a, 238a). Thus, the acknowledgment of the Secretary and managing head of the company referred to by appellees was as follows:

> "After the telegram was sent out from Atlantic City, Mr. Kann reported to me that they were unable to raise any money over the period, that the thing had gone on." (R. 825a)

The period referred to was from the first meeting between Kann and the Commissioner which occurred a few days after the examination had commenced (R. 814a) on May 21, 1947 (R. 885a) until the telegram was sent out from Atlantic City on June 4, 1947 instructing the company not to write any new or

renewable non-assessable policies. (R. 823a) The statement by counsel for the company at the hearing on June 25, 1947 was as follows:

> "* * * Now, when this situation arose the Company was confronted with a practical question to try to raise money to meet the department's requirements. A sincere effort and a more than sincere effort has been made in that direction but unfortunately we are told that prospective lenders, prospective companies who would be interested would need at least sixty days before they could decide whether or not they would take this company over. As late as six o'clock last evening I was in touch with the Vice-President of a company. This company is owned by one of the largest merchandising companies in the world. I talked to the Vice-President personally. He expressed a deep interest and I impressed on him that this action was to be taken this morning, at this time. He said 'Well then, can you get the Insurance Commissioner if we are interested, to defer this hearing?' I said 'I am afraid not,' but I said 'If you will give us a commitment, I believe that the Insurance Commissioner will make, as he has made, an honest and sincere effort to try to save this Company for the benefit of the stockholders, of the creditors and of the public. I called him back four hours later. I talked to his secretary and the secretary said, 'Mr. Reich, I have just sent you a wire, "No interest due to lack of time." ' I feel that some group is going to save this company. It is worthwhile saving." (R. 1770a)

Section 213 of the Pennsylvania Insurance Department Act of May 17, 1921, as amended, P.L. 789 (40 P.S. 51) requires the Insurance Commissioner to grant a hearing to the company examined before filing a report of examination. Such a hearing would have put the company on notice of the amount and basis of the deficit claimed and of the charges. However the company did not see the report of examination until the hearing on June 25, 1947. (R. 1765a)

Section 321 of the same act P.L. 789 (40 P.S. 131), provides that the Commissioner shall, in case he finds the capital or reserve of the company impaired 20%, give notice to the company to make good the capital or reserve within sixty days. That notice or time was never given (R. 231a, 238a).

The deficiencies of the notice of the hearing on June 25, 1947, based upon conclusions drawn from a report of examination which was not prepared in compliance with statutory requirements and which was never furnished to the company before the hearing, have been pointed out in the appellants' Statement of Jurisdiction.

The resolution of the directors again emphasized that the inability of the company to raise the money necessary to bring the reserves of the company up to the amount required by the Commissioner was due to the lack of time afforded. It recited:

> "Whereas, the Company has been advised that the reserves of the Company do not meet the legal requirements of the Insurance Department of the Commonwealth of Pennsylvania; and
>
> "Whereas, the Company has made many efforts to raise sufficient moneys to bring the reserves up to the legal requirements; and
>
> "Whereas, the Company has been unable since it was notified that its reserves were inadequate to raise the additional moneys necessary to bring the reserves of the Company up to the legal requirements; and
>
> "Whereas, the Company has been ordered not to do business except the right to collect premiums and cancel policies; * * *" (R. 1761a, 1762a).

The resolution requested the Insurance Commissioner to immediately take charge of the affairs of the Company "in order to conserve the assets of the Company for the benefit of all concerned" and the resignations of the officers and directors were accepted "in order to facilitate any action of any person or com-

pany to purchase or rehabilitate the Company." At that time the only notice which had been given was of the hearing under Section 502. The liquidation of the company had never been suggested.

The company had no officers after June 24, 1947 except Mr. O'Neill, a Vice-President. (R. 1779a-1786a) The authority of the attorney for the company who appeared at the hearing on June 25, 1947, was limited by the resolution of the directors adopted on June 24th. The resolution was in evidence. (R. 1761a) This authority would have sufficed if the hearing had followed the notice as a Section 502 custodial hearing. The appearance, waiver of notice and of issuance of the rule, acceptance of service and consent to the granting of the relief prayed was also specifically so limited to possession by the Commissioner for the purposes of sale or rehabilitation; that is, to possession under the provisions of Section 505 of the Act. (R. 1839a) This was recognized by the Court to which the decree of liquidation was presented, the decree reciting only that:

> "* * * prior to the issuance of the said Rule the said Keystone Mutual Casualty Company, appeared by its attorney, waived the issuance of the Rule, accepted service of the same, *and consented to possession of the company by the Insurance Commissioner* * * *"

(Emphasis added). (R. 1951a)

Also, the Deputy Attorney General who represented the Insurance Department at the hearing testified:

> "Q. You will agree with me there is nothing in that resolution that authorized the liquidation of the company, is there?
>
> * * *
>
> The Witness:
>
> No, Mr. Reich said the farthest he can agree is to go along on having the Insurance Commissioner take over, because that is what the resolution says, 'and that is what my au-

thority is.' I said, 'Can we agree to this decree we have drawn up?' Then in answer, 'First I can't agree to the decree; the best we can do is accept service and agree to the terms of the resolution that was given by my authority.'

* * *

Q. Did Joseph Reich or any representative of the company either urge or agree that this company be liquidated?

* * *

The Witness:

They did not, quite to the contrary, they were insistent they could get more money. Particularly Reich, he was insistent he could get more money and put himself and the Company in good shape and he said he had been trying to do that for a considerable period of time. He had no authority to agree to anything other than the Insurance Commissioner to take over, and hold until such time as he could accomplish that purpose.* * *" (R. 299a, 303a)

Thus, the attorney for the company did not join in the prayer of the Suggestion of the Attorney General for the liquidation of the company, as stated in the Motion to Dismiss; and, in any event, he had no authority to do so, which was well known both to the Court and to counsel for the Insurance Department.

The statement in the Motion to Dismiss regarding the turning over of assets by other states to the Pennsylvania insurance Commissioner, the settlement of claims, waiver of rights and abandonment of claims is not supported by any factual record references, the reference there being to the argument in the opinion of the Court of Common Pleas in support of its judgment which, itself, does not lend support, except inferentially, to such statements.

The statement in the Motion to Dismiss that "*No appeal was ever taken from the entry of this final decree,*" if it has any significance, again presupposes a valid decree of which appellants had prior notice and an adequate opportunity to resist. They

had neither. The decree was attacked by the intervention of the Matlack Committee on June 2, 1948. It has been under attack ever since. The complaint of lack of notice and opportunity to be heard was not first raised on the appeal to the Supreme Court of Pennsylvania, as stated in the Motion to Dismiss, but was raised before the Court of Common Pleas and was discussed and decided by that Court in its opinion filed March 17, 1952. (R. 1735a-1739a) Neither was it necessary to elicit testimony at the hearing from the officers and directors regarding the lack of adequate notice and of opportunity to be heard. As pointed out in appellants' Statement of Jurisdiction, it was completely and thoroughly shown by the evidence.

II. Does Appeal Lie as the Method of Review?

Much of this section of the Motion to Dismiss is devoted to an effort to establish that the petition to vacate the decree of June 26, 1947, did not raise the Federal question; that under the law of Pennsylvania the issue was determined by the pleadings; and that matters not properly raised in the Court below cannot be invoked on appeal, notwithstanding that they involve constitutional questions. Appellees argument would have some merit if the Supreme Court of Pennsylvania (as did the Court of Common Pleas) had not considered the Federal question to be properly before the Court and decided it against the appellants. It said:

> "The appellant intervenors contend that the decree of June 26, 1947, was void * * * (2) because it was entered without the required notice or hearing * * *"

Again:

> "In order to determine whether the decree of the court below dated June 26, 1947, was valid, it is necessary first to consider (1) the provisions and requirements of the Insurance Code of May 17, 1921, and (2) the constitutional requirement of due process, i.e., notice of a hearing and an opportunity to be heard. These are so closely related

that they will be considered together."

Again:

"* * * The reason why this issue was never previously raised must be obvious; there was adequate notice and ample opportunity to be heard in June 1947 and consequently there was no failure of due process."

And again:

"In the light of all these unusual and indisputable facts, it would strain our credulity to believe and it would be stretching the technicalities of the law far beyond reason for us to hold that the officers and directors of this company did not have adequate notice of the hearing, or that they did not waive the technical requirements of the Insurance Code, or that the Court did not have the right to authorize and direct the Insurance Commissioner to take possession of the Company for the purpose of liquidating it."

Where it appears from the opinion of the State Supreme Court that the Federal question was treated as being sufficiently raised, and was specifically dealt with and ruled against the plaintiff in error, and was necessary to its decision, this is sufficient to confer jurisdiction upon the Supreme Court of the United States.

Mallinckrodt Chemical Works v. *Missouri, ex rel Jones*, 238 U. S. 41, 49, 35 S. Ct. 671, 59 L. ed. 1192.

North Carolina Railroad Company v. *Zachary*, 232 U.S. 248, 257, 34 S. Ct. 305, 58 L. ed. 591.

Miedreich v. *Lowenstein*, 232 U.S. 236, 242, 34 S. Ct. 309, 58 L. ed. 584.

Carlson v. *Washington*, 234 U.S. 103, 105, 106, 34 S. Ct. 717, 58 L. ed. 1237.

St. Louis, Iron Mountain & Southern Railway Company v. *Hesterly*, 228 U.S. 702, 704, 33 S. Ct. 703, 57 L. ed. 1031.

Montana ex rel Haire v. *Rice*, 204 U.S. 291, 298, 299, 27 S. Ct. 281, 51 L. ed. 490.

Chambers v. *Baltimore & Ohio Railroad Company*, 207 U.S. 142, 148, 28 S. Ct. 34, 52 L. ed. 143.

This would be true even though there were nothing in the present record to show that the Federal question was raised in the court below. When it appears that the Federal question was actually considered and decided by the State Supreme Court it is irrelevant to inquire how and when it was raised in a court below.

> *Manhattan Life Insurance Company of New York* v. *Cohen*, 234 U.S. 123, 134, 34 S. Ct. 874, 58 L. ed. 1245.

Although not here significant, it is interesting to observe that in one of the cases cited by appellees as authority to the contrary, the Supreme Court of Pennsylvania has passed upon important constitutional questions which were not raised in the court below.

> *Montgomery County Bar Ass'n.* v. *Rinalducci*, 329 Pa. 296.

Appellees next contend in their Motion to Dismiss that question number 5 in appellant's statement of the questions to be argued on appeal in the Supreme Court of Pennsylvania, and the opinion of the Supreme Court of that State make no specific reference to the due process clause of the Federal Constitution, as distinguished from the due process clause of the State Constitution.

The opinion of the Court of Common Pleas shows clearly that the attack was launched under the due process provisions of both Federal and State Constitutions. Thus, it said:

> "The Commonwealth has advanced the contention that this company was cavalierly interred because certain administrative deficiencies constituted a lack of procedural due process, as required by our Federal and State Constitutions, and further because the entry of our decree of June 26, 1947 deprived the company and its member policyholders of their property without due process of law, since it was entered without compliance with the requisite statutory requirements in the matter of notice and hearing: Armour Transportation Company v. Pennsylvania Public Utility Commission, 138 Pa. Super. Ct. 243, 249 (1939)." (R. 1735a)

The appellants, in their printed brief on appeal to the Supreme Court of Pennsylvania again made reference in the argument to the due process provisions of both the State and Federal Constitutions. (Brief, pp. 37-49; R.)

The Supreme Court of Pennsylvania understood that the challenge was under the due process provisions of both the Federal and State Constitutions, and so decided it. It said:

> "The fundamental requirements of due process in a proceeding affecting property interests are (1) a notice of proceedings appropriate to the nature of the case and adequate to safeguard the rights of the parties, and (2) an opportunity to be heard. *Anderson National Bank* v. *Luckett*, 321 U.S 233; *Dohaney* v. *Rogers*, 281 U.S. 362; *Ballard* v. *Hunter*, 204 U.S. 241; *Union Trust Co. of Pittsburgh Case*, 359 Pa. 363." (R.)

The three cases first cited set out the requirements of due process under the 14th Amendment to the Constitution of the United States; the last cited case sets out the requirements under the similar provision of the State Constitution.

In the case of *New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 68, 69, 49 S. Ct. 61, 73 L. ed. 184, under very similar facts, this Court looked to the opinion of the intermediate appellate court, the printed briefs there, and the authority cited by the highest appellate court of the State, from which the appeal was taken, in order to determine that the challenge was under the 14th Amendment to the Federal Constitution.

Appellees next contend in the Motion to Dismiss that the Supreme Court of Pennsylvania was never asked to, and did not, pass on the validity of the state statute, which is necessary to give this Court jurisdiction on appeal under the provisions of 28 U.S.C. 1257(2).

Although question number five of appellants' statement of the questions to be argued on appeal in the Supreme Court of Penn-

sylvania did not specifically assert the invalidity of the statute as construed or applied, in attacking the decree as depriving the company and its policyholders of property without due process of law, it, of course, was predicated upon the challenge that either the statute was violated or, if not, as had been held by the Court of Common Pleas, the statute as so construed and applied to permit the decree was invalid. Reference to appellants' printed brief in the Supreme Court of Pennsylvania confirms this as the argument. Thus, in the "Statement of Questions Involved" the question was stated in the alternative, as follows:

> "1. Was the entry of the decree of liquidation and forfeiture a violation of the applicable statutes or a denial of due process of law? (Denied)"

(Brief p. 1, R.)

The only logical interpretation of that question is that if the decree did not violate the statutes, the statutes as construed and applied violated due process. As acknowledged in appellees' Motion to Dismiss (p. 6) the brief also makes reference to the particular sections of the Insurance Department Act drawn in question (Brief pp. 37-49, R.) It is proper to refer to the briefs in a state supreme court, which have been certified as a part of the record, where assignments of error are not used, in order to interpret the question which was decided by that court.

> *New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 68, 69, 49 S. Ct. 61, 73 L. ed. 184.

It would not be proper, as held in *Live Oak Water Users Ass'n.* v. *Railroad Commission of California*, 269 U.S. 354, 357-358, 46 S. Ct. 149, 70 L. ed. 305, cited by appellees, and in *Memphis Natural Gas Company* v. *Beeler*, 315 U.S. 649, 651, 62 S. Ct. 857, 86 L. Ed. 1090, if the state supreme court had not passed on the Federal question and there was no showing that the question could be properly raised under the state court practice in that manner.

The opinion of the Pennsylvania Supreme Court leaves no doubt that it construed the statute and considered and passed upon the validity of the statute as so construed and applied to the company under the facts shown by the evidence. It examined the pertinent statutory requirements of notice and hearing to see whether they complied with due process. Thus it said:

> "In order to determine whether the decree of the court below dated June 26, 1947, was valid, it is necessary first to consider (1) the provisions and requirements of the Insurance Code of May 17, 1921, and (2) the constitutional requirement of due process, i. e., notice of a hearing and an opportunity to be heard. These are so closely related that they will be considered together." (R.)

It then noted the requirements of Sections 502 and 506 of the statute relating to notice and hearing and set out the fundamental requirements of due process in a proceeding affecting property interests. It did not note any defect in the statutory requirements. However, dealing specifically with the statutory requirements of an order to show cause and of a full hearing, the Court construed them to be "technical requirements" which had been complied with by the giving of "adequate notice of the hearing" to the officers and directors of the company, or which had been waived by the officers and directors; so that the court had the right to authorize and direct the Insurance Commissioner to take possession of the company for the purpose of liquidating it. The Court specifically held that "* * * there was adequate notice and ample opportunity to be heard in June 1947 and consequently there was no failure of due process." In thus holding that the officers and directors of the company had adequate notice of the hearing and ample opportunity to be heard, and that there was no violation of the statute or failure of due process, the Court necessarily sustained the validity of the statute as so construed and applied, which meets the jurisdictional requirements for an appeal under the provisions of 28 U.S.C. 1257(2). See the cases cited in appellants' Statement of Jurisdiction. The

inadequacy of the "waiver" both factually and legally as a non-Federal ground which will support the judgment has also been discussed there.

In the final analysis, even if the question raised and answered had been only that rights, privileges or immunities guaranteed to appellants under the due process provision of the 14th Amendment to the Federal Constitution were violated, and the question had not reached the validity of the statute as construed or applied, this alone would not be ground for dismissal. Act of June 25, 1948, c. 646, 62 Stat. 962, 28 U.S.C. 2103. Under the provisions of that statute, the papers whereon the appeal was taken would be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.

Where the facts show, as they do here, that petitioner's property was taken by a plain and substantial departure by the Commonwealth from the fundamental rights so guaranteed by the 14th Amendment to the Federal Constitution, a Federal question of serious import is presented.

> *Consolidated Turnpike Company, et al.*, v. *Norfolk & Ocean View Railway Company*, 228 U.S. 596, 599, 33 S. Ct. 510, 57 L. ed. 982, 983.
>
> *Hansberry* v. *Lee*, 311 U.S. 32, 40, 61 S. Ct. 115, 85 L. ed. 22, 26.
>
> *O'Neill* v. *Leamer*, 239 U.S. 244, 249, 36 S. Ct. 54, 60 L. ed. 249, 264.

The forfeiture of the charter and the liquidation of the mutual insurance company is not only a matter of utmost concern to the Commonwealth, to the 26 states in which it has been conducting business, to the assureds (of whom there are approximately 105,000) who, as its members, are interested both in its assets and their possible assessment liability (*Commonwealth ex rel Chidsey* v. *Keystone Mutual Casualty Co.*, 366 Pa. 149, 152;

Rose v. *Turnpike Co.* (pa) 3 Watts 46, 48) and to its creditors, but the decision has resulted in an apparent and unexplained conflict in the decisions of the Supreme Court of Pennsylvania regarding the necessity of compliance by the Commonwealth with the notice and hearing provisions of the statute. In *National Auto Corp.* v. *Barfod*, 289 Pa. 307, such provisions were held essential to the validity of a statute under the 14th Amendment to the Federal Constitution. In this case they were held to be "technical requirements" which were either complied with or which did not have to be complied with under the facts shown by the evidence. This Court would not be expected to resolve that conflict by construing the Pennsylvania Statute, but it can, and should, insure the stability of the rights guaranteed by the 14th Amendment to the Federal Constitution against such vacillation of a state court; especially when it involves a statute of frequent application and of large public importance.

III. Does the Court Have Jurisdiction to Review Either by Way of Appeal or Certiorari?

(1) The Decree of Dissolution Was Not Appealed.

The contention made in the Motion to Dismiss that the original decree of June 26, 1947 was a final order and decree from which no appeal was taken and, accordingly, appellants can expect nothing more than that some consideration be given to the allegation of lack of due process as one of a number of other factors to influence the exercise of the equitable powers of the court, is a question of state practice which has been precluded by the decision of the Supreme Court of Pennsylvania. That Court considered and decided the Federal question, not as an additional reason for inducing the exercise of equitable powers, but as going to the validity of the decree. It said:

> "In order to determine whether the decree of the court below dated June 26, 1947, was valid, it is necessary first to consider (1) the provisions and requirements of the Insur-

> ance Code of May 17, 1921, and (2) the constitutional requirement of due process, i.e., notice of a hearing and an opportunity to be heard." (R.)

As heretofore shown, the decision of the Pennsylvania Supreme Court is sufficient to confer jurisdiction upon the Supreme Court of the United States. It is worthy of comment, however, that it was the very failure to give adequate notice and a full hearing, now complained of, which prevented appellants or anyone in their behalf from appealing the decree of June 26, 1947 within the period of three months permitted by Pennsylvania practice.

(2) Was the Federal Question Properly Raised and Preserved in the State Courts?

The issues raised in this section of the Motion to Dismiss have been discussed in an earlier portion of this brief. Decisions of this Court were cited which hold that where the federal question is considered and decided adversely to the plaintiff in error by the Supreme Court of a State, and is necessary to its decision, that is sufficient to give jurisdiction to the Supreme Court of the United States and it is irrelevant to inquire how and when it was raised in the court below. Those decisions also dispose of the efforts of appellees to interpret statements made by counsel and the judge in the trial court as limiting the issues which may now be considered by this Court. It is significant to observe, however, that the Court of Common Pleas itself did not consider the question so limited and considered and denied the objections raised under the due process provisions of the Federal and State Constitutions. (R. 1735a-1739a)

The case of *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 434-435, 27 S. Ct. 350, 51 L. ed. 553, cited by appellees is one in which the highest appellate court of a state, to which the writ of error was directed, in deciding the case had expressly declared that the course of the argument and briefs of counsel before it confined the case to a

single issue. *DeJonge* v. *Oregon*, 229 U.S. 353, 358, 57 S. Ct. 255, 81 L. ed. 278 was a case in which there was a stipulation of facts filed in the State Supreme Court after appeal to the Supreme Court of the United States had been allowed.

The sufficiency of the Federal question which was raised by appellants, and considered and decided by the Supreme Court of Pennsylvania, to give this Court jurisdiction on appeal has already been discussed.

Appellees contention that the intervention by the Matlack Committee and that of appellants was not timely has been considered and decided adversely to appellees by the Pennsylvania Supreme Court.

> *Comm. ex rel Chidsey* v. *Keystone Mutual Casualty Co.*, 366 Pa. 149.

(3) Is There a Present Case or Controversy?

In this section of their Motion to Dismiss appellees again advance an argument which should have been advanced in the State courts. They cite no facts which were not before the Supreme Court of Pennsylvania and that Court did not refuse to consider the appeal nor did it predicate its decision upon the basis that the question was moot. Appellees' argument here again assumes the validity of the decree of June 26, 1947, and further assumes that the burden of proving the solvency of the Company on the petition to vacate the decree was properly cast. If so much of the decree as provided for the dissolution of the company, the vacation of its charter, and the liquidation of its affairs was void, as is here contended, because entered without the notice and hearing required by due process, the burden of proof would be on the Commonwealth if a liquidation proceeding were brought under Section 506 of the Pennsylvania Insurance Department Act. In

Lancaster and Mintzer's Appeal, 111 Pa. 524, 533

the Supreme Court of Pennsylvania, in reversing a refusal to vacate a decree which had been entered without due notice, rejected the theory of the Court below which placed upon the petitioner the burden of disproving the facts which the decree sought to adjudicate. It said:

> "Where an order, decree, or judgment has been wrongfully entered without notice to a party who was entitled to notice, such party may demand its vacation, at least to the extent that it affects his interest. His right is that he be heard before the judge or court decides, not that there may be an ex parte hearing and adjudication, after which he may, if he can, show that the adjudication unjustly affects him."

The "doubts" the Insurance Commissioner who initiated the petition to vacate the decree on the theory of solvency of the company expressed to the Supreme Court of Pennsylvania in his answer to a petition for supersedeas that a rehabilitation of the company could now be consummated contradicts both his petition and his brief in the Court of Common Pleas and cannot constitute the basis for a decision on the question of rehabilitation which was not involved in the case and concerning which the company is entitled to a hearing upon application duly made under the statute. Section 505, Pennsylvania Insurance Department Act of May 17, 1921, as amended, 40 P.S. 205.

(4) Is a Substantial Federal Question Presented?

Appellees correctly state in this section of their Motion to Dismiss that Sections 502 through 506 of the Pennsylvania Insurance Department Act of May 17, 1921, are related steps of an integral whole governing the manner of handling an insurance company when its business can no longer be conducted safely with due regard for the public interest. Appellants' contentions, however, do not depend upon a "strained construction," but are based upon the unadorned language of the statute.

Section 502 provides that whenever an insurance company is insolvent or in any other specified manner or for any other specified reason has become unstable or unsound

> "* * * the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing apply to the court of common pleas of Dauphin County * * * for an order directing such company * * * to show cause why its business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require."

Section 504 provides the manner of giving notice.

Section 505 provides with respect to a show cause order, that

> "On the return of such order to show cause, and after full hearing before the court * * * the court shall either deny the application or direct the Insurance Commissioner forthwith to take possession of the property and conduct the business of such company * * * and retain such possession and conduct such business until, on the application either of the commissioner, through the Attorney General, or of such company * * * it shall after a like hearing, appear to the court that the ground for such order directing the Insurance Commissioner to take possession has been removed, and that the company * * * can properly resume possession of its property and the conduct of its business."

Section 506 provides that

> "If on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company * * * such liquidation shall be made by and under the direction of the Insurance Commissioner * * *"

Several conclusions are irresistible from a mere reading of the statute.

There must be a hearing before application by the Attorney

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General to the Court, regardless of the relief requested which, of course, should be consistent with the nature of the facts established at the hearing.

There must be a "full hearing" on the rule to show cause why a possession order should not issue.

After possession is taken, if the Insurance Commissioner is not to engage in the permanent operation of the business, two outcomes are possible. The company may be rehabilitated under the provisions of Section 505 or it may be liquidated under the provisions of Section 506. In either event an application and hearing is required. Section 506 specifies an order to show cause and a full hearing before an order of liquidation.

The rules to show cause required by the separate sections 505 and 506 of the Act must give notice of the objectives set forth in their respective sections.

If "such other relief" referred to in Section 502 includes liquidation, then Section 506 which specifically provides for liquidation and requires "a like application and order to show cause, and * * * a full hearing" must be followed and notice of liquidation must be given.

Appellees say that this is not the construction placed upon these sections by the Pennsylvania courts. It is the enactment of the General Assembly of Pennsylvania which is sufficiently clear to require no construction, and which had not been rejected by the Supreme Court of Pennsylvania until it held in this case that the decree of June 26, 1947 neither violated these "technical requirements" of the statute nor deprived appellants of due process of law.

The Motion to Dismiss cites no other cases in which the Supreme Court of Pennsylvania, or this Court, have approved a different construction of the statutes. In the cited quotation from *Penn General Casualty Co.* v. *Commonwealth of Pennsyl-*

vania, 294 U.S. 189, 55 S. Ct. 186, 79 L. ed. 850, where the question of the construction of the statute was not in issue, the Court was merely undertaking to show the authority of the state court to proceed with the cause in the absence of jurisdiction having been obtained by a district court. In that case a hearing was had before the Insurance Commissioner on September 14, 1933. A further hearing was held before the Attorney General on October 14, 1933. The suggestion praying for the liquidation of the company was filed in the Court of Common Pleas on December 8, 1933. The order to show cause was served on December 11, 1933. The Court entered its decree liquidating the company March 14, 1934. The company had ample notice and opportunity to defend.

The hearing before the Attorney General under Section 502 of the statute, which may lead to a possession order and subsequent rehabilitation, is not the order to show cause and full hearing required by Section 506 before an order of liquidation is entered and by which specific notice of liquidation must be given. A company may readily consent to the former which would never consent to the latter.

The necessity, under the circumstances which were known by the court and by counsel for the Insurance Department to exist, of affording some sort of notice which would have protected the policyholders as a class, has already been discussed in the Statement of Jurisdiction.

Appellees next contend in this section of the Motion to Dismiss that the company was not entitled to the hearing before the filing of the report of examination provided by Section 213 of the Act nor to the notice of impairment of reserves and an opportunity to repair them provided by Section 321 because these sections do not relate to insolvent companies; that in such cases, Sections 502-506 control.

In making this contention appellees, by construction, have

read limitations into these sections of the Act which have not been placed there by the carefully considered language of the Pennsylvania General Assembly or by the Courts. Obviously a company should be permitted every opportunity afforded by the statute to challenge a report of examination which purports to find it insolvent because its very existence is then threatened. Obviously, also, such a report may hinder but does not preclude a repair of the impairment to its reserves. It is evident that Sections 213 and 321 were not intended to deal only with factual situations not covered by Section 502 when it is reflected that in almost any instance where it is found that there is an impairment of 20% in the capital or reserves which the Commonwealth deemed were necessary to insure the safety of the public, a finding would also be authorized that the further transaction of business would be hazardous to the policyholders, creditors, or the public within the meaning of Section 502.

The only construction of the statute which is significant here is that which has been adopted by the Supreme Court of Pennsylvania in this case. This Court is not required to indulge in statutory construction in order to determine and protect appellants' rights under the due process provision of the Federal Constitution. Those rights would exist, and would have been violated by the manner of liquidation of the company under the statute regardless of whether any provision of the statute required prior notice and hearing. Cf *National Auto Corp.* v. *Barfod*, 289 Pa. 307. These requirements of the statute, which the Supreme Court of Pennsylvania held were not circumvented, merely serve to underscore and emphasize the violation by the Commonwealth of appellants' constitutional rights.

(5) Does the Decision Rest Upon Non-Federal Grounds Which Independently Support the Judgment?

The first three non-Federal grounds which appellees claim independently and adequately support the judgment are: (a) peti-

tioner did not carry the burden of proving the solvency of the company at June 26, 1947, as alleged in the petition to vacate; (b) the company was in a precarious financial condition on June 26, 1947, its officers having admitted its insolvency, that its affairs were mismanaged, its records manipulated and its financial condition fraudulently misrepresented; and, (c) the company was insolvent as of the date of the filing of the petition to vacate. Each of these grounds assumes the validity of the decree of June 26, 1947, and, accordingly, that the burden of proof was properly cast on the petitioner in the hearings on the petition to vacate the decree. If the decree of dissolution was invalid, as contended by appellants, because they were deprived of constitutional rights, the burden would be on the Commonwealth in a new proceeding for liquidation, at a full hearing afforded after adequate notice, to establish one or more of the statutory causes for the liquidation of the company. Accordingly, as no one of these grounds can be supported unless the Federal question is determined in favor of the validity of the liquidation decree of June 26, 1947, so no one of them can independently and adequately support the judgment of the Supreme Court of Pennsylvania.

It is only where the non-Federal ground does not depend upon the decision of any Federal question, and is broad enough to sustain the judgment, that the Supreme Court has no power to disurb it.

> *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U.S. 157, 164, 37 S. Ct. 318, 61 L. ed. 644, and citations;
>
> *Postal Telegraph-Cable Company* v. *City of Newport*, 247 U.S. 464, 475, 38 S. Ct. 566, 62 L. ed. 1215.

The Supreme Court of the United States has jurisdiction to review a decision of a state court based upon a Federal and a non-Federal ground where the non-Federal ground is so inter-

woven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision on the other.

> *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773, 51 S. Ct. 252, 75 L. ed. 690.
>
> *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U.S. 157, 164, 37 S. Ct. 318, 61 L. ed. 644.

Appellees next contend that the finding by the Supreme Court of Pennsylvania that the officers and directors waived all of the requirements of notice under the Insurance Code was a non-Federal ground which independently and adequately supported the judgment.

It is the duty of the Federal Supreme Court to review and correct the error of a state court in resting its decision denying asserted Federal rights upon a basis of fact which has no support in the record.

> *Postal Telegraph-Cable Company* v. *City of Newport*, 247 U.S. 464, 473, 38 S. Ct. 566, 62 L. ed. 1215.

The limited authority of the officers and directors under the law of Pennsylvania, the limited scope of the resolutions adopted by the directors, and the limited relief to which the attorney consented has already been pointed out in the Statement of Jurisdiction and in the discussion of facts in this brief. It is significant also that the very language of the decree entered on July 26, 1947 assumes a consent "to possession" but nowhere, by its specific terms, recognizes or assumes any agreement to the prayers or to all the averments of the Suggestion or any consent, on behalf of the company, that it be dissolved or liquidated. (R. 1951a) There was no such consent. This finding has no factual support in the record and, if it had occurred, could not bind the company or its members under the law of Pennsylvania. It is without substance.

Appellees next contend that the case was decided by the lower court upon issues of fact involving non-Federal grounds and concludes that this Court is bound by such findings of fact of the State Court. In inquiring whether the State Court rested its decision upon independent non-Federal grounds adequate to support the judgment, the Supreme Court of the United States is unconcerned with the conclusions of the trial court, or with those of an intermediate appellate court, and considers only the action of the Supreme Court of the State from which the appeal s taken.

> *Allen* v. *Southern Pacific Railroad Company*, 173 U.S. 479, 489, 19 S. Ct. 518, 43 L. ed. 775.

It is the judgment of the Supreme Court of Pennsylvania which is sought to be reviewed here; not that of the lower court. The State Supreme Court specifically passed upon the Federal question and decided it against the contentions of Appellants. Appellees cannot reach down to the lower court in their frantic search for substantial non-Federal grounds. Any specific issues of fact, involving non-Federal grounds, which independently and adequately supported the judgment in the State Supreme Court appealed from should be pointed out by appellees.

In subdivision (e) it is contended that the notice and hearing provisions of the Insurance Code, as construed by the Pennsylvania Courts, relate only to solvency, and as the findings of fact establish the insolvency of the company, no one has been harmed by lack of notice or of opportunity to be heard.

It is no answer to one who protests against the taking of his property without due process of law that due process of law would have led to the same result.

> *Coe* v. *Armour Fertilizer Works*, 237 U.S. 314, 424, 35 S. Ct. 625, 59 L. ed. 1027.

Certainly Appellees cannot and do not claim that the company was not hurt by a finding, at the hearing of which it was denied

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adequate notice, of one of the very charges against which it was not permitted the time or opportunity to defend. Accordingly, we must assume that this contention has reference to the findings of the Court of Common Pleas on the petition to vacate the decree. These findings were based upon the assumption of the validity of the decree of June 26, 1947, which the Court held to impose upon the Commonwealth the burden of establishing by "clear and satisfactory" evidence that the company was solvent on the date of dissolution and that this burden was not carried. (R. 1725a, 1726a) Thus again, this contention is dependent upon the decision of the Federal question. However, it should also be noted that neither the Supreme Court of Pennsylvania in this case nor any other authority cited by appellees has held in express terms nor in language which may readily be so interpreted that the notice and hearing provisions of the Insurance Code relate only to the issue of solvency. Such a construction would certainly be at variance with the unambiguous words of the statute. But it would also, unquestionably, give this Court jurisdiction on appeal in a case where the company was denied adequate notice and a full hearing on several vague and general charges which included not only its solvency but also mismanagement, the writing of hazardous business, maintaining inadequate records, falsifying an annual report and issuing cash or nonassessable policies beyond the date when it was possessed of the surplus required by law. (R. 1760a) The question then would involve not only the proper construction of a state statute, as suggested by appellees, but also whether the statute as construed to require notice and a full hearing only on the charge of insolvency and not on the other charges would be repugnant to the due process provision of the Federal Constitution.

Standard Oil Company of California v. *Johnson*, 316 U.S. 481, 482, 62 S. Ct. 1168, 86 L. ed. 1611.

Ward & Gow v. *Krinsky*, 259 U.S. 503, 510, 42 St. Ct. 529, 66 L. ed. 1033.

Finally, in subsection (f) of their Motion to Dismiss appellees contend that the Court did not uphold the validity of the decree against an attack on federal grounds but discussed "due process" generally. This question has been sufficiently answered in an earlier part of this brief and it is deemed unnecessary to repeat the language of that decision specifically so deciding.

IV. Conclusion

In *Gelpcke* v. *City of Dubuque*, 68 U.S. (1 Wall.) 175, 206, 17 L. ed. 520, this Court said:

> "We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice."

The requirements of Section 213 of the Pennsylvania Insurance Department Act that the Insurance Commissioner grant the company a hearing before a report of examination is filed; those of Section 321 that he give the company sixty days notice to make good an impairment of twenty per centum in the company's reserves; and those of Section 506 that an order to show cause issue and a full hearing be granted before the court decrees the liquidation of the company were intended to provide the company and its members with adequate notice of any charges which might result in the liquidation of the company, and an opportunity to be heard concerning them. If the charges are contained in or based upon a report of examination, additional notice and hearing are provided. These provisions are effective, however, and will afford the protection required by due process only if they are obligatory upon the Insurance Commissioner and upon the Commonwealth.

In this case the protection which the plain language of those sections appears to require was not afforded to the company or to appellants. The charges were not made specific and were

based upon a report of examination which was not completed until June 24, 1947 and was not shown to the company until June 25, 1947, at which time the dissolution of the company was first suggested. On the following morning its dissolution was decreed. Thus, the blindfold was removed barely in time for the company to see, but not to resist, the coup de grace.

When the Supreme Court of Pennsylvania held that these "technical requirements" of the Insurance Code had not been violated, or had been waived, it unquestionably vested jurisdiction by way of appeal in this Court because it construed the Act and found it valid as so construed and applied. It also erected the altar and decreed the sacrifice when it found a waiver which the facts and the law abundantly demonstrate did not and could not exist. Appellants respectfully submit that this Court has jurisdiction on appeal and that the Motion to Dismiss should be denied.

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